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09/868,040	07/23/2001	Kenichi Otani	209313US3PCT	5365
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OBLON, SPIVAK, MCCLELLAND, MAIER & NEUSTADT, P.C. 1940 DUKE STREET ALEXANDRIA, VA 22314			MAI, TRI M	
			ART UNIT	PAPER NUMBER
			3727	

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 09/868,040  
Filing Date: July 23, 2001  
Appellant(s): OTANI ET AL.

**MAILED**  
**NOV 17 2004**  
**GROUP 3700**

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Derek Mason  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed 08/10/04.

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**(1) *Real Party in Interest***

A statement identifying the real party in interest is contained in the brief.

**(2) *Related Appeals and Interferences***

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

**(3) *Status of Claims***

The statement of the status of the claims contained in the brief is correct.

**(4) *Status of Amendments After Final***

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) *Summary of Invention***

The summary of invention contained in the brief is correct.

**(6) *Issues***

The appellant's statement of the issues in the brief is correct.

**(7) *Grouping of Claims***

The rejections of claims 11, 12, 15, 35, and 36 stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7).

**(8) *Claims Appealed***

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(9) Prior Art of Record**

2,530,124	Kieckherfer	11-1950
2,042,210	Clay	5-1936
2,738,914	Hatch	3-1956
1,966,469	Taylor	7-1934

**(10) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

1. Claims 11, 12, 15, 17, 35 and 36 are rejected under 35 U.S.C. 103(a) as being unpatentable over either Kieckhefer (2530124) or Clay (2042210).

Regarding claim 11, Kieckhefer teaches a pulp container (col. 2, lines 9) having a bottom portion and a body portion, with an angle of approximately 83 degrees (col. 1, lines 58-60) at the corners at portions 11 and 12 whose thickness is greater than a thickness of other portions at 4 and 5.

Kieckhefer meets all claimed limitations except for the angle is at 85 degrees or greater between an outer surface of a sidewall of the body portion and a ground contact plane. It would have been obvious to one of ordinary skill in the art to provide an angle at 85 degrees in Kieckhefer to provide the desired angle for the tray.

Kieckhefer is silent with respect to the body having a height of 50 mm (2 inches) or more, it would have been obvious to one of ordinary skill in the art to provide the body of the claimed dimension, since molded article are often having a height more than 2 inches.

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Furthermore, a change in size/proportion is generally recognized as being within the level of ordinary skill in the art

Regarding claims 12, and 35, the molded container of Kieckhefer inherently has a density  $\rho_2$  being smaller than  $\rho_1$  at portions 5 and 4 due to the stamp molding process.

Clay teaches a pulp container (col. 1, line 4) having a bottom portion and a body portion, with an angle of approximately 85 degrees as shown in Fig. 6, and corners as shown in Fig. 4 whose thickness is greater than a thickness of other portions. With respect to the limitation of the corner being continuously tapering into the thickness T1, the corner of Clay meets this limitation, i.e., it continuously tapering into the a thickness T1 from the corner's two ends.

Clay meets all claimed limitations except for the angle is at 85 degrees or greater between an outer surface of a sidewall of the body portion and a ground contact plane. It would have been obvious to one of ordinary skill in the art to provide an angle at 85 degrees in Clay to provide the desired angle for the tray.

Regarding claims 12 and 35, the molded container of Clay inherently has a density  $\rho_2$  being smaller than  $\rho_1$  at portions 5 and 4 due to the stamp molding process.

With respect to the body having a height of 50 mm or more, it would have been obvious to one of ordinary skill in the art to provide the body of the claimed dimension, since a change in size/proportion is generally recognized as being within the level of ordinary skill in the art.

Regarding claim 15, it would have been obvious to one of ordinary skill in the art to make thickness T1 being .1 mm or more, and T2/T1 being 1.5-2.0 in either Kieckhefer or Clay to provide the desired protection at the corner of the container.

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Regarding claim 17, it would have been obvious to one of ordinary skill in the art to make the container with the relationship of  $.1 \times \rho_1 < \rho_2 < \rho_1$  in either Kieckhefer or Clay the desired density protection at the corner of the container.

2. Claims 11, 12, 15, 17, 35, and 36 are rejected under 35 U.S.C. 103(a) as being unpatentable over either Kieckhefer or Clay, in view of either Hatch or Taylor. To the degree it is argued either Kieckhefer or Clay do not teach the angle being greater than 85 degrees, Hatch teaches the angle can be 85 degrees (col.2, line 25), i.e., angle 30 can be about five degrees. Likewise, Taylor teaches that it is known in the art to construct a molded paper container with 90 degrees angle as shown in Figs 2-3. It would have been obvious to one of ordinary skill in the art to make the container of Kieckhefer or Clay with an angle being 85 degrees or more to as taught by either Hatch or Taylor provide the desired shape and/or volume of the container.

**(11) Response to Argument**

1. **Rejection over the Kieckhefer reference:** Applicant argues that Kieckherfer teaches away from the reference. It is noted that in the declaration under 37CFR 1.131, the angle of the container is not a determined factor in determining the strength of the claimed container. As set forth above, Kieckherfer teaches the angle at 83 degrees. As compared to the claimed angle at 85 degrees, the specification is silent whether there is a significant functional difference between the claimed container and the one shown in Kieckherfer.

With respect to the stacking teaching in Kieckhefer, one of ordinary skill in the art would know that the different between 83 degrees and 85 degrees has little effect on the nesting of the empty containers, See Hatch rejection where Hatch teaches the container can be stacked at 85 degrees.

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2. **Rejection over the Clay reference:** Applicant argues that Clay does not teach the limitations of claim 11. It is agreed that Clay is silent on the specific angle being 85 degrees. It is noted that the angle measured in Clay is approximately measured at about 82-87 degree using a protractor. However, the specification and the declaration under 37CFR 1.131 are silent on whether the claimed container would perform better in these angles. The examiner maintains that one of ordinary skill in the art would know to vary the angles as desired, such as, one would vary the angle for stackability of the package (the sidewall angle closer to the 90 degrees would accommodate more strength via the sidewalls when packages are stacked on a shelf of a super market, and occupies less lateral space on the shelf).

3. **Rejection of Kieckhefer and Clay over the limitations of claim 12:** Applicant argues that neither Kieckhefer nor Clay teaches the density  $\rho_2$  smaller than a density  $\rho_1$  at portions 5 and 4. It is clear that both containers of Kieckhefer and Clay are made from the stamping molding process. As elementary physics dictates, when a sheet of pulp material (paper) undergoes the stamp molding process, the region that compresses thinner would be denser; thus, the density is greater (density=mass/volume). The examiner does not have access to machineries to produce and test the containers similar to that of Kieckhefer and Clay, and applicant have not answer why the law of physics cannot be applied in this case.

4. **Consideration of the declaration under 37CFR 1.131:** The declaration under 37CFR 1.131, not 37CFR 1.132 as asserted by applicant, have been fully considered as set forth in the previous Office Action, but the declaration was not persuasive. First it is noted that the purpose of the declaration under 37CFR 1.131 is to declare prior invention and it is ineffective under rejections over either Clay or Kieckhefer. Even to the degree the test results are to be

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considered, it is noted that the test were done on six containers based on the thickness of the walls and corners. The test arrives at the conclusion that the thicker the corner would perform better. The rejections stand on the following grounds: a) The applied references already teach the thickness at the corner being greater than the thickness of the sidewall; b) Applicant fails to show how the claimed container would perform better than the containers of either Clay or Kieckhefer; c) The test fails to show how the claimed angles effect the performance of the containers and given the ranges being taught by the prior art; d) Applicant asserts that the compressive strength is solely determined by the relationship of  $T2/T1$ . This is confusing since the compressive strength normally determined by  $P/A$  (force/area). Applicant has not responded to any of these issues raised in the previous Office Action.

**5. Rejection of either Kieckhefer and Clay over Hatch**

Hatch teaches the angle can be 85 degrees (col.2, line 25), i.e., angle 30 can be about five degrees. It would have been obvious to one of ordinary skill in the art to make the container of Kieckhefer or Clay with an angle being 85 degrees as taught by Hatch to provide the desired shape and/or volume of the container.

It is noted that Hatch is perfectly combinable with Kieckhefer since both are related to stackable containers.

The Examiner notes the various suggestions in Hatch to use the desired angles for utilizing minimum amount of molding materials while provide effective nesting.

Further objects of the present invention include the provision of molded pulp types of berry boxes that have good nesting characteristics as well as suitable tear resistance and require a minimum of molding materials. (col. 1, line 29-32)



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The quantity of molding materials required to form the container can be reduced by shaping the walls between the shoulders, and the tops so 55 that they have a substantially flat vertical section. (col. 1, line 53-55)

**6. Rejection of either Kieckhefer and Clay over Taylor**

Taylor teaches that it is known in the art to construct a molded paper container with 90 degrees angle as shown in Figs 2-3. It would have been obvious to one of ordinary skill in the art to make the container of Kieckhefer or Clay with an angle being 85 degrees or more as taught Taylor provide the desired shape and/or volume of the container.

The examiner notes that providing an article with a sidewall at 85 degrees or more, in this case 90 degrees, is within one of ordinary skill in the art since Taylor teaches that such angle is achievable give the apparatus and the method in Taylor.

**7. Others:** Other arguments with respect to the density differences and the declaration have been fully considered as set forth above.

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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Tri M. Mai  
Primary Examiner  
Art Unit 3727

*T. Mai*

November 15, 2004

Conferees

Gary Elkins, Nathan Newhouse

*GE*

*See Ser*

OBLON SPIVAK MCCLELLAND MAIER & NEUSTADT PC  
FOURTH FLOOR  
1755 JEFFERSON DAVIS HIGHWAY  
ARLINGTON, VA 22202